**ISUTA INTERNATIONAL SDN BHD & ORS** A

**v.**

**MAHKAMAH PERUSAHAAN MALAYSIA & ANOR**

HIGH COURT MALAYA, PULAU PINANG B
VARGHESE GEORGE J
[JUDICIAL REVIEW NO: 25-83-11-2011]
31 MAY 2012

***ADMINISTRATIVE LAW**: Judicial review - Application for - Interim award by Industrial Court - Claim by employee against company under liquidation - Whether leave of High Court required - Whether Industrial Court within effects of s. 226(2) and (3) of Companies Act 1965 - Whether liquidators privy to dismissal of employee - Whether liquidators could be added as parties* C D

***COMPANY LAW:** Winding up - Claim by employee against company under liquidation - Whether leave of High Court required - Whether Industrial Court within effects of s. 226(2) or (3) Companies Act 1965*

***WORDS AND PHRASES:** 'Action or proceeding' - Meaning of - Companies Act 1965, s. 226(2), (3)* E

Loo Tong Seng ('the second respondent') lodged a representation under s. 20(1) of the Industrial Relations Act 1967 ('the Act') that he had been dismissed by the first applicant, Isuta International Sdn Bhd ('Isuta'), without just cause and excuse. On 25 October 2010 the Minister referred the representation to the Industrial Court ('the IC') for an award. However, Isuta had resolved to be wound up by way of a creditors' voluntary petition on 17 June 2010 and the second and third applicants had been appointed as liquidators of Isuta. The liquidators brought to the attention of the Industrial Court the issue of 'leave' of the High Court being required before the second respondent could proceed with his claims against Isuta, a company under liquidation. The IC took the position that no leave was required from the High Court. Subsequently, the second respondent applied to add or join the liquidators as further parties in his case before the IC. The IC heard this application and made the interim award to add the liquidators as further parties in this action. The interim award provided that the liquidators were appointed in their 'official F G H I

capacity' and not in their 'personal capacity'. The liquidators have, by way of the present application, applied for a judicial review of the decision of the IC. Isuta and the liquidators prayed for the interim award to be quashed on the grounds that the IC had committed an error in law in ruling that 'leave' of the High Court was not required for the joinder application to be heard and for the second respondent's claim against Isuta to be proceeded with further. The liquidators relied on s. 263(2) of the Companies Act 1965 ('the CA') to submit that after the commencement of winding up 'no action or proceeding should be proceeded with' except by leave of court. The liquidators also submitted that as they were appointed long after the dismissal of the second respondent, they were not privy to the facts or circumstances surrounding that dismissal. As such, the liquidators contended that there was no justification in adding them as parties in the second respondent's case of unfair dismissal. The second respondent contended that the IC could choose to be flexible and hold that strict compliance with s. 263(2) of the CA was not required.

**Held (allowing application with costs):**

**(1)** The words 'action or proceeding' found in s. 263(2) and (3) of the CA should be given their natural and ordinary meaning and accorded a meaning not in isolation but in the context of the totality of the subject provision. The words 'action or proceeding' had a wide reach to encompass and cover all types of processes before a court, or a tribunal or similar adjudicatory body vested with judicial or quasi-judicial powers. The common denominator was whether that forum in question was discharging duties to settle disagreements or complaints properly brought before it in accordance with relevant laws. As the IC, which was statutorily entrusted to deal with industrial relations complaints, was such an adjudicatory body, it was caught within s. 226(3) or (2) of the CA. Under s. 226(3) or (2) of the CA a clearance from the High Court by way of leave was necessary to commence or proceed with that 'action or proceeding' when it was brought against a company where a creditors' winding up, whether voluntary or compulsory, was underway. (paras 19 & 21)

**(2)** The IC had merely followed the IC cases, which had failed to consider or sufficiently deal with the meaning of the words 'action or proceeding' found in s. 263(2) and (3) of the CA, and neither had he himself embarked upon such an

examination. In the result, the ruling in this instant IC case to the effect that no leave was required, was a misinterpretation of the statutory provision in question, and therefore, an error in law was committed by the IC, which had to be quashed. (para 28)

**(3)** In the interim award, the IC did not give sufficient consideration as to whether the liquidators were necessary parties. In the present case, the liquidators were not privy to the circumstances which led to the dismissal of the second respondent. It is trite that as liquidators they were not personally liable or accountable to any award that would be made against Isuta ultimately. (para 30)

**(4)** Further, the enforcement of any such eventual award of the IC, could only be processed by way of filing the relevant proof of debt with distribution subject to consequential procedures for applying the available funds of Isuta. Therefore, the inclusion of the liquidators as further respondents in the second respondent's claim against Isuta, did not satisfy the clear criteria for them to be added as necessary parties in the IC proceedings. The IC did not explain how the inclusion of the liquidators even in their 'official capacity' would make the enforcement of the award more realisable for the second respondent. As such, the decision of the IC to join the liquidators as further respondents was no justified and was an irrational decision that had to be quashed. (paras 30-36)

**(5)** The provisions of s. 30(5) of the Act was not a licence to commit a breach of or to neglect the express applicable provisions of the CA in the case of this reference before the IC. (paras 37 & 39)

**(6)** The IC in the present case had misinterpreted the law and/or misdirected itself on the applicability of s. 236(2) of the CA in respect of the second respondent's claim against Isuta. The IC's decision to add the liquidators as parties to the second respondent's claim against his employer was also irrational and contrary to accepted principles of law or procedure. As such, the entire interim award was ordered to be quashed by way of an order of *certiorari*. (paras 41 & 42)

**Case(s) referred to:**

*Desaru Impian Resort v. Malkit Singh Ram Singh [2003] 2 ILR 474* ***(refd)***

*DNT (Malaysia) Sdn Bhd v. Zamri Said [2002] 2 ILR 240* ***(refd)***

*Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors [1996] 4 CLJ 747 CA* ***(refd)***

*Heng Kiah Woo v. Consolidated Farms Berhad [2009] 3 ILR 237* ***(refd)***

*Hochtief Gammon v. Industrial Tribunal, Bhubaneshwar, Orissa & Anor AIR 1964 SC 1746* ***(refd)***

*Mariana Ghazali & Ors v. Co-Operative Central Bank Ltd (in Receivership) & Ors [1989] 2 ILR 497* ***(refd)***

*Mohd Rashid Mohd Ibrahim v. Uncang Emas Sdn Bhd [2007] 2 LNS 2444* ***(refd)***

*Ramaswamy Iyer v. The Management of Bhuvaneswari Pulverising Mills [1981] 1 MLJ 458* ***(refd)***

*Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC* ***(refd)***

*Sheila Sangar v. Proton Edar Sdn Bhd & Anor [2009] 8 CLJ 200 HC* ***(refd)***

*TT Electrical Electronics Corporation (M) Sdn Bhd v. Yong Peng Kean [2005] 2 ILR 169* ***(refd)***

**Legislation referred to:**

Companies Act 1965, ss. 226(3), 255(6), 263(2)
Essential (Protection of Depositors) Regulation 1986, reg. 10
Industrial Relations Act 1967, ss. 20(1), (3), 30(5)
Rules of the High Court 1980, O. 53

**Other source(s) referred to:**

Loh Siew Cheang, *Corporate Powers Accountability*, 2nd edn, p 1280

*For the applicants - HY Choong (Alison Ong with him); M/s Azman Davidson & Co*
*For the 2nd respondent - Raja Suriya; M/s Raja Suriya & Co*

*Reported by Vani Krishnan*

## JUDGMENT

**Varghese George J:**

### Background

**[1]** This was an application brought by the second and third applicants pursuant to O. 53 of the Rules of the High Court 1980 (RHC) to quash the Interim Award No: 1337 of 2011 issued on 13 September 2011 by the learned Chairman (Chairman) of the Industrial Court (IC) in Industrial Court Case No: 18-4-153-11.

**[2]** The second respondent had lodged a representation under s. 20(1) of the Industrial Relations Act 1967 (IRA) that he had been dismissed on 9 October 2008 by Isuta International Sdn Bhd (the first applicant) without just cause and excuse. The Honourable Minister Of Human Resources had on 25 October 2010 referred the representation to IC for an award under s. 20(3) of the IRA.

**[3]** On 17 June 2010 however, the first applicant had resolved to be wound-up by way of a creditors' voluntary winding-up process and the second and third applicants were appointed on the same day to be the liquidators of the first applicant.

Upon being notified by IC of the proceedings against the first applicant, the second and third applicants brought to the attention of the IC, the restrictions pursuant to s. 263(2) of the Companies Act 1965 (COA), namely that after the commencement of the winding-up, no action or proceedings shall be proceeded with or commenced against the company except by leave of the High Court, and subject to such terms as may be imposed by the High Court.

**[4]** The IC appeared not to agree and took the position that no 'leave' was required from the High Court and proceeded to refix the matter for mentions on 13 June 2011.

**[5]** On 31 May 2011, the second respondent applied to add or join the second and third applicants, (the liquidators of the first applicant), as further parties (respondents) in the IC case. The IC on 25 August 2011 went on to the hear the second respondent's application in presence of counsel for all parties, and *vide* the interim award of 13 September 2011 referred above, proceeded to add the second and third applicants as further parties in the IC case.

The Chairman in the interim award further stated that the second and third applicants were being added as additional respondents in the IC case in their 'official capacity' and not in their 'personal capacity'.

A **Interim Award**

**[6]** The Chairman in ruling that 'leave' was not required in this case to further progress the IC case (including the second respondent's application to add further parties) referred to the
B decisions on that point made by the Industrial Court in the following cases:

(a) *TT Electrical Electronics Corporation (M) Sdn Bhd v. Yong Peng Kean* [2005] 2 ILR 169;

C (b) *Desaru Impian Resort v. Malkit Singh Ram Singh* [2003] 2 ILR 474; and

(c) *DNT (Malaysia) Sdn Bhd v. Zamri Said* [2002] 2 ILR 240.

D (The cases relied on by the Chairman are discussed later down in this decision.)

**[7]** In respect of the joinder (of party) issue, the Chairman referred to the Indian Supreme Court decision in *Hochtief Gammon v. Industrial Tribunal, Bhubaneshwar, Orissa & Anor* AIR 1964 SC
E 1746 where it was opined that being a 'Tribunal', the forum in question, like the IC here in our case, could direct other persons to be joined as would be necessary to represent the interest of either the employer or the employee, if the named parties could not represent completely or adequately the employer or employees,
F as the case may be.

The test spelt out in *Hochtief Gammon*'s case, which was expressed as follows:

G > The test for adding other parties must be whether they will make adjudication effective and enforceable.

was applied with approval by our Court of Appeal in *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747; [1996] 4 MLJ 747 per Gopal Sri Ram JCA (as he then
H was).

**The Applicants' Contention In Summary**

**[8]** It was the applicants submission that the Chairman had committed an error in law when he ruled that 'leave' of the High
I Court was not required for the joinder application to be heard and/or for the IC case to be proceeded with further. It was also

contended that the Chairman had committed an error both on the facts and in law when allowing the second and third applicants to be added as respondents in the reference. A

Accordingly, the thrust of the submissions of the applicants' counsel was that there was illegality and/or irrationality evidently surrounding the interim award made by the Chairman and this court exercising its judicial review jurisdiction could intervene and nullify the impugned rulings. B

**[9]** With regard to the 'leave' issue, it was argued that firstly, the wording of s. 263(2) of the COA ('no action or proceeding shall be proceeded with') extended to even cases or proceedings at the IC and secondly, the objective or acknowledged purpose behind the need for 'leave' from the perspective of a company under liquidation, applied with equal force in respect of matters where an 'adjudication' of claims or rights was pending even in the IC. C D

**[10]** Counsel for the applicants informed that his research had not unearthed any decision of the superior courts on this issue. The decisions that seemed to hold that no leave was required when the subject proceedings were in the IC, were all awards only of the IC in other IC cases. E

**[11]** It was also contended for the applicants that the factual circumstances obtained in this case did not justify the joinder of the second and third applicants in the IC case at all, that is, even in their 'official capacity', for it would not serve to make 'the adjudication effective or enforceable', the test which the Chairman himself chose to apply. F

The second and third applicants as liquidators of the first applicant, it was contended, were appointed long after the alleged dismissal of the second respondent and they were not privy to the facts or circumstances surrounding that dismissal, in any event. G

Further, even assuming that second respondent was successful to secure an award of compensation from the IC, the second respondent's rights to recover the compensation, or enforce the award in his favour, was subject to the normal law and process in a winding-up situation, through the filing of a proof of debt and subject to the order of priority in distribution etc, as clearly required under company law in the course of liquidation of any incorporated company. H I

A **Second Respondent's Contention In Summary**

**[12]** Counsel for second respondent in her sprinted submissions argued that the Chairman was right in holding that 'leave' was not required as his ruling was in tandem with previous decisions of the
B IC on this contentious point of law. It was her submission too, that the word 'proceeding' in s. 263(2) ought to be given a narrow meaning. Cases before the IC involving companies in liquidation were not caught by that provision, as otherwise it would, she argued, stifle or impede the right of aggrieved workman
C in seeking a fair and adequate redress expeditiously, which was the principle purposes of the IRA, a piece of social legislation.

**[13]** Counsel for respondent also advanced on argument premised upon s. 30(5) of the IRA stating that the IC was enjoined to dispense substantive justice without being bound to strict legal
D rules and procedure and if this court was to hold that s. 263(2) applied, than it would amount to a repudiation of 'public policy' and/or 'public interest', undergirding the IRA.

It was suggested that if 'leave' was ordered to be necessary, then
E companies with the intention of avoiding liabilities for bad industrial practices, might attempt to hide behind the veil of 'winding-up'. Any such possible avenue for abuse should not be left open.

F **[14]** It was also submitted that second and third applicants, as liquidators, were necessary parties in the IC case as the second respondent's claim of dismissal without just cause, a serious complaint at that, according to counsel, could not be adequately dealt with by the liquidator in the winding-up process, through the
G process of filing a proof of debt and the consequential steps involved.

**Assessment Of The Court**

**[15]** The appropriate point to begin any deliberation of the issues
H for determination here would be s. 263 of the COA, which was in the following terms:

263 – Property and proceedings

I (1) Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of a creditors voluntary winding up shall be void.

(2) After the commencement of the winding-up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

The restrictions in that COA provision applied to all cases where there was a 'creditors' voluntary winding-up'.

An equipollent provision in the COA was s. 226(3) which applied to situations where there was, as commonly referred to, a compulsory creditors' winding-up' by an order of court. That subsection read:

S. 226(3) When a winding up order has been made or provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:

(a) by leave of Court; and

(b) in accordance with such terms as the Court imposes.

**[16]** In s. 263(2), the key words were that "After the commencement ... no action or proceeding shall be proceeded with or commenced against the company except by the leave of the court ...

By s. 255(6) of COA, the voluntary winding-up in the case of the first applicant had commenced with the passing of the resolution by the company that it be wound-up on 17 June 2010.

**[17]** Commenting on the underlying rationale for the restrictions found in ss. 263(3) and 226(3) the respected author of *Corporate Powers Accountability*, 2nd edn., (at p. 1280) – Loh Siew Cheang, noted as follows:

The statutory purpose behind s. 226(3) of the Act is not for the purpose of impeding the claims of creditors but to save the company from being burdened with costs if it were made to face many suits. This might be to the detriment of the general body of creditors as it has the effect of reducing the quantum of available assets for distribution ... It is for these reasons that leave of court is necessary and leave will only be given if it is right and fair to do so in all the circumstances of the case.

**[18]** In the *Companies Act of Malaysia, Annotations* (by Woon and Hicks), the same rationale was elaborated in the following terms:

> ... The purpose of these provisions is to ensure that no one creditor is able to gain an undue advantage by obtaining discharge of his debts in full. A primary principle of insolvency law is that ordinary creditors should be paid off out of the remaining assets equally in proportion to their debts. Since in members' voluntary winding up, creditors should be paid off in full, the issue does not arise and so there is no statutory stay of proceedings or enforcement ... . Further, it is intended that all claims against the company should be processed by the inexpensive summary proceeding of proving in the winding up and not by parallel actions which would be a drain on the assets.

**[19]** In my view, the term 'action or proceeding' found in s. 263(2) has to be primarily interpreted in its natural and ordinary meaning as found in that provision. The court could however fall back on the rationale referred to above to obtain assistance to fix the extent to which those words 'action or proceeding' applied.

**[20]** The words 'action or proceeding' (taken separately or together, irrespective) as found in s. 263(2) (or for that matter in s. 226(3)) of the COA), must also be accorded a meaning not in isolation but in the context of the totality of the subject provision. Read in that context it followed then that the words 'action or proceeding' referred to some mode or step adopted or taken in the judicial arena to enforce a legal right or where some form of 'adjudication' of interest was involved. A clearance from the High Court by way of leave was necessary to commence or proceed with that 'action or proceeding' when it was brought against a company where a creditors' winding-up, whether voluntary or compulsory was underway.

In *Words, Phrases and Maxims – Legally and Judicially Defined* by Anandan Krishnan (vol. 12) the following meanings ascribed to the word proceeding are found:

> The term 'proceeding' is very comprehensive and generally speaking means a prescribed course of action for enforcing a legal right ...

> Proceeding is a prescribed course of action for the enforcement of a legal right ... The words is wider in amplitude than the words 'case'. It may also include administrative proceedings ...

**[21]** In my reading therefore, the words 'action or proceeding' here in s. 263(2), had a wide reach to encompass and cover all types of processes before a court, or a tribunal or similar adjudicatory bodies vested with judicial or quasi-judicial powers. The common denominator that had to be applied was whether that forum in question, handling such action or proceeding, was discharging duties to settle disagreements or complaints properly brought or laid before it in accordance with relevant law.

The IC was most definitely one such adjudicatory body statutorily entrusted to deal with industrial relations complaints, subject to the provision of the IRA. It followed then that all proceedings before the IC brought against a company under process of creditors' winding-up, were caught within ss. 226(3) or 263(2) of COA (as the case maybe) and 'leave' was a prerequisite for that matter or even for any application within that proceeding, to be further proceeded with or progressed.

**[22]** Of course that would not be the case if there was any exemption granted from the effects of s. 226(3) and s. 263(2) of the COA to 'proceeding' in the IC, My attention was not drawn to any such provision, and neither could I find any either, in the COA or the IRA which exempted 'proceeding' before the IC from obtaining 'leave' to be further proceeded with.

**[23]** The second respondent as noted above relied on three Industrial Court decisions/awards to contend otherwise, that is, that no 'leave' was required.

In *TT Electrical Electronics Corporation* award, the Chairman there was only correct, in my view, in so far as his ruling was that no leave of the High Court was required to 'commence' proceedings in the IC, given that the cases before the IC brought pursuant to s. 20 of the IRA was 'commenced' by way of a reference by the Minister and such Ministerial discretion should not be curtailed. In fact the quoted observation of Padmanabhan J in the case of *Ramaswamy Iyer v. The Management of Bhuvaneswari Pulverising Mills* [1981] 1 MLJ 458 (also referred to *Mariana Ghazali*'s case) was also only to that effect, namely, there ought not to be any restriction imposed on the power of the Minister to make a reference to IC for an adjudication under the IRA.

The Chairman there was however, in my view, clearly in the wrong when ruling that no 'leave' was required to proceed with a joinder application brought once a reference was already registered by the IC. The Chairman appeared to be satisfied simply with the distinction made by another IC, that is, in *DNT (Malaysia) Sdn Bhd*'s case, which ruled that no 'leave' was required because the '... Industrial Court is a Tribunal and not a Civil Court'.

The Chairman there, as it also appeared, was not invited to nor did he consider the true purport or extent of the meaning to be given to the terms 'action or proceeding' as found in s. 263(2) of the COA. As discussed by me above it did not matter it was a 'tribunal' or called by some other name: the IC was carrying out adjudicatory functions.

**[24]** In the *Desaru Impian Resort* award, it did not appear that the Chairman there did address himself fully either, to the implications surrounding the words 'action or proceeding' in the context of s. 226(3) or s. 263(2) of the COA and where a company cited as a respondent in an IC case was under liquidation. He seemed to have come to the conclusion that no 'leave' to proceed was required, purely and merely relying on the other IC awards/rulings in *DNT (Malaysia) Sdn Bhd* and *Mariana Ghazali*'s cases. In this *Desaru* case, the application before the IC was to have the liquidators substituted as a party and to be noted here was the further fact, that the liquidators had no objections to be substituted as a party in that IC case.

**[25]** The one other IC award relied upon by the second respondent in support of their position was *Mariana Ghazali & Ors v. Co-Operative Central Bank Ltd (in Receivership) & Ors* [1989] 2 ILR 497.

The Chairman there in that reference was dealing with an objection raised by the respondent that 'leave' of the High Court was required to 'commence' the proceedings at the IC.

It must be firstly pointed out that the facts surrounding that case were peculiar to itself. It involved a reference by the Minister brought against a 'Receiver' (not liquidators). The receiver there had been appointed by Bank Negara Malaysia under reg. 10 of Essential (Protection of Depositors) Regulation 1986. The *dictum* there in that case by the Chairman principally related to the

'commencement' of the proceedings and did not address the scope or tenor of the restrictions applicable under s. 226(3) or s. 263(2) of the COA, when in a case a 'liquidator' was the other party.

Furthermore, being a proceeding related to complaints brought under the Essential Regulations, there was a larger 'public interest' element discernable there as well for the case to proceed without being impeded by technical or procedural objections.

**[26]** Contrary to the position taken in the aforesaid rulings of the IC that no 'leave' was required, it was brought to the attention of the court by counsel for the appellant that there was also an award of another IC, that is, in *Mohd Rashid Mohd Ibrahim v. Uncang Emas Sdn Bhd* [2007] 2 LNS 2444, where the Chairman there in his deliberations under the sub heading 'Company in Liquidation', opined that 'leave' of the High Court was indeed required to even add the liquidators as further parties/respondents in the IC proceedings. That relevant part of the award in *Mohd Rashid Mohd Ibrahim* case, was as follows:

> 15, When the Industrial Relations Act 1967 was enacted the intention of Parliament was clear. Disputes between employers and their employees should be speedily and expeditiously disposed off without much regard to strict legal forms and technicalities. This is because the Industrial Court although named a Court is a tribunal in substance. This Court is very conscious that Parliament had enacted that cases that come before the Industrial Court should be expeditiously disposed of. The Companies Act was enacted to regulate the affairs of companies and Section 226(3) of the Companies Act seems to be in conflict with the aspirations of the Industrial Court to expeditiously dispose of disputes between the companies and their employees. The provision of Section 226(3) applies to all companies. No exception has been enacted to exempt companies in proceedings in the Industrial Court from that effect. In any event decisions and awards of the Industrial Court, may still have to come before the civil courts for enforcement and compliance. In the humble opinion of this Court, on a strict interpretation of Section 226(3) leave should be required from the High Court to bring the liquidator into the proceedings. Any award in monetary compensations in favour of the Claimant would involve the participation of the Claimant in the distribution of assets by the liquidator in the Company. In most cases involving companies under liquidation, the liquidator if there is one appointed, does not bother to come forward to resist the claim. This is so not because of the numerous rulings in the Industrial Court declaring that no leave

A is required but because the Company under liquidation is usually depleted of any assets left for distribution. Hence the question of whether leave is required or not has to-date become more of an academic question that a practical one in proceedings in the Industrial Court.

B **[27]** The views expressed by the Chairman of the IC in *Mohd Rashid Mohd Ibrahim*'s case that 'leave' was required and there was no exemption granted from those requirements of the COA, accorded with the view that I had formed as earlier stated on this issue. The words 'action and proceeding' as found in s. 226(3) or C s. 263(2) of COA required leave of the High Court not just to proceed with the subject IC case where the respondent was a company under liquidation but also where any interlocutory application (such as to join or add the liquidator(s) as further respondents) was to be filed therein,

D **[28]** It was obvious that, save for the Chairman in *Mohd Rashid Mohd Ibrahim*'s case, the chairmen in the other IC cases had only given scant attention and had failed to consider or sufficiently deal with the meaning the words 'action or proceeding' in s. 226(3) or E s. 263(2) of the COA bore in its proper perspective in the COA.

The Chairman in this instant case merely followed those IC cases which had not dealt with the issue in depth (as shown above) and neither had he himself embarked upon such an examination. In the F result, my conclusion was that the ruling or such part of the interim award in this instant IC case to the effect that no 'leave' was required was a misinterpretation of the statutory provision in question, and therefore an error in law committed by the Chairman which had to be quashed.

G *Whether Second And Third Applicants Necessary As Further Parties In The IC Case*

**[29]** As noted earlier, the generally accepted test for adding other parties in an IC case was whether such parties would make H 'adjudication effective and enforceable' and whether such party or parties was/were 'necessary for the representation of the employee or employer to be complete or adequate at the trial'.

**[30]** The question then rightfully to have been asked by the I Chairman here was how would the joinder of the second and third applicants as parties assist in the effective adjudications of the reference and/or the enforcement of any award to be issued

ultimately by the IC in the matter. The Chairman did not in the interim award, in my assessment, give sufficient consideration as to whether the second and third applicants were necessary parties on those grounds.

The Chairman was certainly ambivalent when he allowed the joinder but qualified it by saying - that the second and third applicants were being added in their 'official capacity' and not their 'personal capacity'.

**[31]** The liquidators (second and third applicants) would have been necessary parties on those counts, if and only if, in my view, they had employed the second respondent or the second respondent was dismissed during the tenure of office of the liquidators. That was not the case here. (Such was the situation however in *Mariana Ghazali*'s case.)

**[32]** The second and third applicants were not privy to the circumstances which led to the dismissal of the second respondent in any case. It was trite that the second and third applicants in the conduct of this statutory duties and responsibilities as liquidators would not be personally liable or accountable to any award that might be made against the first applicant ultimately.

**[33]** With respect to 'enforcement' of any such eventual award of the IC, it was also trite that any recovery of compensation ordered if at all, could only be processed by way of filing the relevant proof of debt and also subject to consequential procedures for applying the available or realised funds of the first applicant, in any event.

As pointed out to this court, by counsel for the second and third applicants, in the IC case of *Heng Kiah Woo v. Consolidated Farms Berhad* [2009] 3 ILR 237, we had a situation where the party who had an award of the IC in his favour, had filed a non-compliance complaint and had attempted to join the liquidators as parties in the non-compliance proceedings. The Chairman there dismissed the non-compliance complaint and directed that a proof of debt be filed with the liquidator. It was also noted there that the party with the award in his favour would only be an unsecured creditor and had to wait for distribution subject to the order of priority applicable in the case of a company being wound-up. It was ruled there therefore that there was no purpose served by bringing the liquidators even at the stage of any 'non-compliance' action.

**[34]** It was my conclusion therefore, that the inclusion of the second and third applicants as further respondents in the IC case, did not satisfy the clear criteria for them to be added as necessary parties in the IC proceedings. The Chairman did not explain how the inclusion of the liquidators even in their 'official capacity' would make adjudication effective or the enforcement of any award more realisable for the second respondent.

Obviously, the second respondent's attempt, sadly agreed to by the Chairman in this case, was, in my assessment purely made to personally embarrass the second and third applicants.

**[35]** It was also my view, that an annotation as against the name of the first applicant (as is normally done) that the company was 'In Liquidation' in the intitulement or further process papers in the IC case, was sufficient to denote the status of the first applicant for all intents and purposes.

**[36]** It was my conclusion therefore that the ruling of the Chairman in this instant case to join the second and third applicants as further respondents was not justified in the circumstances and there was no cogent reason given by the Chairman or any necessity shown for such inclusion. It was in the circumstances an irrational decision of the Chairman that had also to be quashed.

**Public Policy/Public Interest Submission Of Second Respondent**

**[37]** This submission of the second respondent was basically anchored on s. 30(5) of the IRA which read as follows:

> The Court shall act according to equity good conscience and substantial merits of the case without regard to technicalities and legal form.

As I understood, the effect canvassed by counsel for the second respondent was that s. 30(5) of the IRA offered a sort of blanket exception from the strictures of the law or applicable procedures in so far as the conduct of IC cases were concerned. Accordingly, it was submitted that this court could choose to be flexible and hold that strict compliance with s. 263(2) of the COA was not required in this case and/or that the second and third applicants be allowed to remain as respondents in the IC case here.

**[38]** In this regard, it is important to have in mind, the cautionary words of the recent Federal Court decision in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2011] 3 AMR 38 as to the latitude permitted by s. 30(5) of the IRA. That was a case where it was argued that the principle in law that 'a party was bound by its pleadings' ought not to be strictly applied in an IC case. The Federal Court there laid down most explicitly that s. 30(5) IRA cannot be used to override or circumvent the basic rules of pleadings.

**[39]** What more then in our instant IC case, where the issue was more significant in its implications, namely, compliance or breach of ss. 226(3) and 263(2) of the COA, important statutory provisions which applied to all 'action and proceeding' against companies which were under creditors' winding up process and included there in the legislation for a definite purpose ...

I could not therefore agree with submissions of counsel for the second respondent. The provisions of s. 30(5) IRA was not a license to commit a breach of or to neglect the express applicable provisions of the COA in the case of this reference before the IC.

## Judicial Review

**[40]** As admirably summarised by Mohamed Ariff JC (as he then was) in *Sheila Sangar v. Proton Edar Sdn Bhd & Anor* [2009] 8 CLJ 200:

> ... the first principle in judicial review is that review is concerned with the decision-making process, not the merits, substance or justification. The second principle is that there can be an exception to this first principle where the court can examine the substance or justification to satisfy itself that the decision maker has not transgressed the principles of procedural impropriety, illegality or irrationality (with a possible third principle, "proportionality").

**[41]** Having given consideration to the specific facts of this case and the reasoning of the Chairman set out in the interim award, I found that the Chairman had misinterpreted the law and/or misdirected himself on the applicability of s. 236(2) COA in respect of this IC case. The Chairman's decision to proceed and consider the application of the second respondent to join the second and third applicants as additional respondents in the IC case without

'leave', was therefore clearly tainted with illegality. Leave of the High Court ought to have been obtained in the first place to proceed with case before the IC and even to bring that joinder application.

I also found that the Chairman's decision to then proceed and add the second and third applicant was also irrational and contrary to accepted principles of law or procedure, as there was no necessity shown for such inclusion to be ordered, even going by the applicable criteria in the IC, for addition of further parties in proceedings before it, namely, to 'make the adjudication effective and enforceable.'

**Conclusion**

**[42]** In the result, I allowed this judicial review application of the second and third applicants and made the following orders:

(a) an order of *certiorari* to quash the entire Interim Award No: 1337 Year 2011 in the Industrial Court case No: 18-4-153-11 dated 13 September 2011 wherein the first respondent held that leave from the High Court was not required before the second respondent could proceed with his claims against the first applicant and allowed the second respondent's application to join the second applicant and the third applicant as parties.

(b) a declaration that the action in the Industrial Court Case No: 18-4-153-11 against the first applicant shall not be proceeded with except with the leave of the High Court.

**Costs**

**[43]** Cost to be paid by second respondent to applicants fixed at RM1,000